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It is paramount to the public interest and the fulfillment of the promise of Section 309(j) of the Communications Act that the Commission take steps to ensure the timely distribution of D, E and F block licenses to a broad cross section of licensees. The FCC must take lessons learned from the C block and apply them to this next auction. Specifically, the Commission should adopt the litigation tested C block rules and resist changes that can subject this process to further attack. By extending small business benefits to all three 10 MHz bands, the Commission dramatically increases its ability to meet the statutory requirements under Section 309(j) in a manner that is race and

gender neutral. Finally, the greatest value for these licenses to potential bidders and the public lies with a simultaneous auction of the D, E and F blocks in July.

A. Adopt the C Block Rules

The clear purposes of Section 309(j) will not be furthered by attempting to justify race and gender classifications for the D, E and F auction. The C block precedent of two stays and another caused by the decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), cannot be ignored. Regulations which confer benefits based on race and gender classifications will invite litigation and "test cases" and therefore will ultimately result in further delay to the deployment of PCS services and consequently preserve the undue concentration of licenses these auctions were intended to address. It is also a mistake to interpret Section 309(j) as a mandate only for the inclusion of minority and women owned businesses. The public interest and legal precedent clearly favors the broadly inclusive C block definition of small business rather than narrower categories based on race and gender.

Results of the C block auction itself further support the proposed rules. The two largest winners in the C block auction to date, NextWave and DCR, both indicated eligibility under the previous race and/or gender classifications. These two bidders alone are winning over 120 million POPs primarily in the top 60 markets for an aggregate net price of nearly \$5.5 billion. Additionally, the NPRM correctly notes that of the 255 bidders

that qualified to bid in the C block auction, 46 claimed minority-owned business status and 24 claimed women-owned business status. In all likelihood these numbers are even slightly understated since the *Competitive Bidding Sixth Report and Order* eliminated such distinctions prior to short form filings. These results are the best possible evidence supporting adoption of the race and gender neutral benefits now proposed by the Commission.

B. Extend All Small Business Benefits to D, E and F Bands

The FCC's proposed extension of small business benefits to all three 10 MHz licenses will greatly further all the objectives of Section 309(j). The inclusive definition of "small business" provides potential benefits to all of the so called "designated entities" under the Communications Act. The underlying record already supports the fact that the vast majority of minority and women owned businesses are also small businesses. The extension of financing benefits to the D and E bands greatly increases the likelihood for a broader dissemination of PCS licenses.

Phoenix further suggests that the Commission extend the 25% bidding credits to the D and E bands to bolster competition and further the mandate of Section 309(j). Bidding credits in the C and F blocks are essentially meaningless since virtually all bidders are eligible. On the other hand, bidding credits in the D and E blocks will enable small businesses to compete more equally against cellular carriers which is precisely what Congress intended. By adopting this measure the Commission will

be offering tangible proof to all small businesses, including women and minority owned firms, that it does intend to ensure their participation in PCS.

Another meaningful step to ensure broad small business participation and avoid undue concentration will be for the Commission to clarify that licenses won in the C block will in fact be considered in determining eligibility in the D, E and F auction. This simple clarification should eliminate the need for changing small business definitions or creating new classes of small business. Those kinds of material changes to the existing C block rules only add undue litigation risk for an uncertain benefit.

C. A Simultaneous D, E and F Auction Serves the Public Interest

Phoenix fully supports the Commission's proposal to simultaneously auction all three 10 MHz licenses in July. The added flexibility helps virtually all potential bidders. The timely conduct of this auction allows many unsuccessful C block bidders another chance to participate in PCS. The combined auction takes into account the interrelated nature of each license and maximizes their value to many potential competitors. Finally, a simultaneous auction under the proposed rules ensures speedy deployment of PCS and ensures a broader dissemination of licenses under Section 309(j).

Conclusion

In many ways, the proposed D, E and F auction is a continuation of a course that was previously set by the C block

process. The Commission should take advantage of past lessons and adopt the C block rules for this auction. The Commission should resist material changes to these rules in order to avoid further litigation delay. By quickly proceeding with a combined auction with small business benefits, including the 25% discount and favorable financing terms, being extended to the D, E and F blocks, the Commission will be making significant progress towards the fulfillment of the promise of Section 309(j) of the Communications Act.

Respectfully submitted,

PHOENIX, L.L.C.

By: Lawrence R. Sidman
Lawrence R. Sidman
VERNER, LIIPFERT, BERNHARD,
McPHERSON AND HAND, CHARTERED
901 15th St., N.W., Suite 700
Washington, D.C. 20005
(202) 371-6206

Its Attorneys

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